



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 13 OF 2018

STEPHEN MALINGU.....APPLICANT

VERSUS

SHABAN WANDERA ODINGA (An Administrator to the estate of the

late Wandera Adingo Berenge alias Andera Odingo Berenge).....1ST RESPONDENT

WILLIAM OJIAMBO ADINGO2ND RESPONDENT

EDWIN WANDERA3RD RESPONDENT

ZAINABU NEKESA WANDERA4TH RESPONDENT

ABDALLA MULONGO OMARIA5TH RESPONDENT

JOSEPH NGURU NGIGI.....6TH RESPONDENT

HASSAN ALI ODAYA..... 7TH RESPONDENT

BUSIA LAND REGISTRAR 8TH RESPONDENT

HON. ATTORNEY GENERAL 9TH RESPONDENT

RULING

1. What is before me for determination is a Motion on Notice brought under Sections 1A, 1B and 3A of Civil Procedure Act (cap 21), Order 40 rule I (b) of Civil Procedure Rules and all other enabling provisions of law. The motion is dated 6/3/2018 and was filed on 7/3/2018. The Applicant – **STEPHEN MALINGU** – is the Plaintiff in the suit on which the application is premised. The suit was filed on 22/2/2018. The two Respondents – **SHABAN WANDERA ODINGO** and **WILLIAM OJIAMBO ADINGO** – are the Defendants in the same suit.

2. The application came with five (5) prayers but some of them are now spent and are therefore not for consideration at this stage. The spent prayers are 1, 2, and 4. The prayers for consideration now are 3 and 5, which are as follows:

Prayer 3: That this honourable court be pleased to issue a permanent injunction restraining the Respondents, their agents, servants, employees and/or persons claiming through them from trespassing on, cultivating on land parcel Nos BUKHAYO/MUNDIKA/3179, 5610 and 11733 – 11739 whatsoever pending the hearing and determination of the main suit.

Prayer 5: That the costs of this application be provided.

3. The Applicant alleged that he is the owner of Land Parcels BUKHAYO/MUNDIKA/3179, 5619 AND 11733 – 11738 all being excisions or subdivisions of the original land parcel No. BUKHAYO/MUNDIKA/151. The Applicant's position is that he purchased the parcels of land from the deceased owners but the respondents succeeded the owners and left him out.

4. The Respondents replied to the application vide grounds of opposition dated 18/4/2018 and dated 19/7/2018. According to the

Respondents, the application is fatally defective and incompetent for failing to comply with mandatory provisions of law. It was alleged too that there was another case – ELC No. 170/2014 – which was withdrawn and this case is therefore brought in bad faith. This suit was also alleged to be *res-judicata*, several past suits of similar nature having preceded it and all having been determined in Respondents’ favour.

5. The application was canvassed by way of written submissions. The Applicant’s submissions were filed on 31/5/2018. The Respondents filed two sets of submissions, first on 24/5/2018 and second on 25/6/2018. I have read the submissions and for reasons I shall state shortly, I will not delve into details. For now, I wish to state that an amended plaint was filed on 24/5/2018, some two and a half months after the filing of the application and/or three months after the suit was filed.

6. The amended plaint introduced several other Defendants all of whom are said to be owners of several parcels claimed by the Applicant. There was no concomitant amendment of the application to capture the new reality introduced in the amended plaint. The case before the court must now proceed on the basis of the amended plaint, not the original plaint. There is an obvious mis-match and/or incongruity between what the application seeks to restrain and the reality brought by the amended plaint.

7. An explanation is necessary: In the original plaint, the Respondents appear to be the owners of Land parcel Nos. BUKHAYO/MUNDIKA/11733, 11734, 11735, 11737 and 11738. They also appear to own land parcels Nos. BUKHAYO/MUNDIKA/3179 and 5619. The Applicant claims to have purchased these parcels of land and he is therefore claiming ownership. In the amended plaint however, new land parcels are introduced viz: BUKHAYO/MUNDIKA/11906, 11915 and 11916. New owners are also introduced, with EDWIN WANDERA said to own 11734 while ZAINABU NEKESA is said to own Nos. 11735 and 11736. These two parcels appear to have undergone changes, with parcels Nos.12288 – 12289 arising from them. One Abdalla Mulongo Omaria is said to own parcel No.11737.

8. The reality in the amended plaint is not captured in the application. The application is therefore asking for orders whose effectiveness is doubtful. No court of law would wish to issue ineffective orders. The basic consideration while issuing an order is whether it will serve the purpose of clarity and effectiveness. That is why I said I will not delve into the details of the submissions. The application has shortcomings that make it a non-starter. And it is a non-starter because the order sought fails to capture some parcels of land mentioned in the amended plaint and fails also to seek injunctive relief against some new owners.

9. But I may need also to point out that the Respondents reply also seemed misplaced. The reply is mainly focussed on the issue of *RES-JUDICATA*. And the issue as raised is based on several other disputes allegedly filed in the past. The matter at hand relates to an application; not the suit. Even if I were to be minded to entertain the issue of *RES-JUDICATA*, what I am supposed to determine ultimately is the success or failure of the application. I would understand if there was a similar application decided on merits in the previous cases. In a scenario like that, the Respondents would be right to say that the instant application is *RES-JUDICATA*, the earlier similar application having been decided on merits. That however is not the case here.

10. In the defence filed by the Respondents, it is intimated that the issue of *RES-JUDICATA* would be raised as preliminary point. That approach is correct in my view. The Respondents should have raised the issue as an objection solely focused on the suit as filed. When raised that way, the objection has the potential to dispose of the entire suit. But raising the issue of *Res-judicata* as a response to the application is clearly a mis-directed endeavour.

11. Overall however, the outcome of the application is based not on the Respondents response but on the shortcomings noticeable in the application itself. And that is why it is not necessary to delve into the details of the submissions filed or even consider whether the threshold for granting injunctive relief as set out in the celebrated case of **GIELA Vs CASSMAN BROWN & CO. LTD [1973] EA 358** has been met.

12. Without much ado therefore, the application herein is found deserving only of one outcome: **DISMISSAL**. And it is hereby dismissed with costs.

Dated, signed and delivered at Busia this 18th day of September, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant:

1st Respondent:

2nd Respondent:

3rd Respondent:

4th Respondent:

5th Respondent:

6th Respondent:

7th Respondent:

8th Respondent:

9th Respondent:

Counsel of Applicant:

Counsel of Respondents: